SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 20, Honorable Socrates Peter Manoukian, Presiding

Courtroom Clerk: Hientrang Tranthien
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2320

LAW AND MOTION TENTATIVE RULINGS

To contest the ruling, call (408) 808-6856 before 4:00 P.M.

"The Opposing Counsel on the Second-Biggest Case of Your Life Will Be the Trial Judge on the Biggest Case of Your Life." – Common Wisdom.

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DATE: 15 September 2020 TIME: 9:00 A.M.

In light of COVID-19-related health concerns and due to the order of the Public Health Department, Department 20 has resumed Law & Motion calendars but with safe-distancing protocols. Please check this tentative rulings page before making any appearance. Any uncontested matter or matters to which stipulations have been reached can be processed through the Clerk in the usual manner. Please include a proposed order.

This Court no longer provides for Court Reporters in civil actions except in limited circumstances. If you wish to arrange for a court reporter, please use Local Form #CV-5100. All reporters are encouraged to work from a remote location. Please inform this Court if any reporter wishes to work in the courtroom.

TROUBLESHOOTING TENTATIVE RULINGS

If you see last week's tentative rulings, you have checked prior to the posting of the current week's tentative rulings. You will need to either "REFRESH" or "QUIT" your browser and reopen it. If you fail to do either of these, your browser will pull up old information from old cookies even after the tentative rulings have been posted.

SOCIAL DISTANCING PROTOCOLS

Entry into the Courthouse.

As for matters which require personal appearances, protocols concerning social distancing and facial coverings in compliance with the directives of the Public Health Officer will be enforced.

Individuals who wish to access the courthouse are advised to bring a plastic bag within which to place any personal items that are to go through the metal detector located at the doorway to the courthouse.

Virtual Access into the Courthouse.

While the Court will still allow physical appearances, all litigants are encouraged to use the Zoom platform for Law & Motion appearances. Use of other virtual platform devices will make it difficult for all parties fully to participate in the hearings. Please note the requirement of entering a password (highlighted below.)

Join Zoom Meeting
https://scu.zoom.us/j/96144427712?pwd=cW1JYmg5dTdsc3NKNFBpSjlEam5xUT09

Join by phone:
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Meeting ID: 961 4442 7712

One tap mobile
+16699006833,,961 4442 7712#

Meeting ID: 961 4442 7712
Password: 017350

Sign-ins will begin at about 8:30 AM. Court staff will assist you when you sign in. It will help if you "rename" yourself as follows: in the upper right corner of the screen with your name you will see a blue box with three horizontal dots. Click on that and then click on the "rename" feature. You may type your name as: Line #/name/party

If you are a member of the public who wishes to view the Zoom session and remain anonymous, you may simply sign in as "public."

The Santa Clara County Superior Court has established listen-only telephone Lines to allow remote access to public court proceedings. To listen to a public court proceeding in Department 20, you may dial 888-251-2909. When prompted, enter the access code number 4362730 when prompted, followed by the pound or hashtag (#) sign.

This session will not be recorded. State and Local Court rules prohibit photographing or recording of court proceedings whether in the courtroom or while listening on the Public Access Line or other virtual platform, without a Court Order. See Local General Rule 2(A) and 2(B); ***California Rules of Court***, rule 1.150.

Protocols during the Hearings.

Please notify this Court immediately if the matter will not be heard on the scheduled date. ***California Rules of Court***, rule 3.1304(b).

If a party fails to appear at a law and motion hearing without having given notice, this court may take the matter off calendar, to be reset only upon motion, or may rule on the matter. ***California Rules of Court***, rule 3.1304(d).

This Court expects all counsel and litigants to comply with the Tentative Rulings Procedures that are outlined in Local Civil Rule 7(E) and ***California Rules of Court***, rule 3.1308. A failure to timely notify this Court and/or the opposing parties may result in the tentative ruling being the final order in the matter.

A party may give notice that he or she will not appear at a law and motion hearing and submit the matter without an appearance unless this Court orders otherwise. This court will rule on the motion as if the party had appeared. ***California Rules of Court***, rule 3.1304(c).

During any hearing, counsel and any litigant are requested to speak slowly and to not use any hands-free mode. Headsets with earbuds will be of great assistance to minimize feedback.

Do not hesitate to correct the Court or court staff concerning the pronunciation of any name. If your client is with you, please inform the Court how your client would prefer to be introduced.

The Court will prepare the Final Order unless stated otherwise below or at the hearing. Counsel are to comply with ***California Rules of Court***, rule 3.1312.

Tentative Rulings Are Continued Below. Full Orders Are On The Following Pages.

LINE #	CASE #	CASE TITLE	RULING
LINE 1	20CV363266	San Jose Hardwood Floors Carpet & Vinyl, Inc. vs David Frederickson et al	Defendants NRT, Coldwell, and Bell's demurrer to the eighth, seventeenth, and eighteenth causes of action in plaintiffs' FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)], i.e., are barred by the applicable statutes of limitation, is SUSTAINED with 10 days' leave to amend. Defendant Bell's demurrer to the ninth, tenth, and twelfth causes of action in plaintiffs' FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] is OVERRULED. Defendants NRT, Coldwell, and Bell's demurrer to the fourteenth through seventeenth causes of action in plaintiffs' FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] is SUSTAINED with 10 days' leave to amend. Defendants NRT and Coldwell's demurrer to the eighteenth cause of action in plaintiffs' FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] is OVERRULED. Defendants NRT and Coldwell's demurrer to the nineteenth cause of action in plaintiffs' FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] is OVERRULED. Defendants are given 10 days' leave to answer where the demurrers were overruled.
LINE 2	20CV366086	Milpitas Town Center 2008 L.P., A California Limited Partnership vs James Anderson et al	Defendants Tenant, Anderson, and Hin's demurrer to Plaintiff's complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] and on the ground that the pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is OVERRULED. Defendants are given 10 days' leave within which to answer the complaint.
LINE 3	18CV323048	Jesus Garnica et al vs Santa Clara Unified School District	SEE ATTACHED TENTATIVE RULING.
LINE 4	18CV323463	Nancy LaScola vs Theodore LaScola	NO TENTATIVE RULING. The Parties may appear either via the Zoom platform or appear in person. Please advise this Court of your preference.

LINE #	CASE #	CASE TITLE	RULING
LINE 5	19CV345499	Sergev Firsov vs Yevgeniy Babichev et al	NO TENTATIVE RULING. The Parties may appear either via the Zoom platform or appear in person. Please advise this Court of your preference.
LINE 6	19CV345499	Sergev Firsov vs Yevgeniy Babichev et al	NO TENTATIVE RULING. The Parties may appear either via the Zoom platform or appear in person. Please advise this Court of your preference.
LINE 7	19CV353314	Rosalinda Ramos Cerano, et al. vs Granite Rock, Michael Taylor, et al	The request of moving parties to compel all plaintiffs to respond to the form interrogatories is GRANTED. The request of moving parties to compel plaintiff Rosalinda Ramos-Cerano to respond to special interrogatories is GRANTED. All plaintiffs are to provide code-compliant responses without objections within 30 days of the filing and service of this Order. The request of moving parties to compel all plaintiffs to respond to the requests for production of documents is GRANTED. All plaintiffs are to provide code-compliant responses without objections within 30 days of the filing and service of this Order. The request of defendants/cross-complainant's Michael Taylor and Granite Rock Company for monetary sanctions is GRANTED. Plaintiff shall pay counsel for moving parties the sum of $1,072.50 within 30 days of the filing and service of this Order.
LINE 8	18CV336490	Safe Products for Californians, LLC vs Homegoods, Inc. et al	The motion of Plaintiff Safe Products for Californians LLC for an order approving proposition 65 settlement and consent judgment and attorneys fees is GRANTED. Counsel for Plaintiff is to prepare the final order and judgment for signature by this Department.
LINE 9	19CV340508	City of Santa Clara vs D.E. II Restaurants, Inc.	The Court is going to CONTINUE this motion and the related Trial Setting Conference to 15 December 2020 at 9:00 AM in this Department. See attached Tentative Ruling.
LINE 10	20CV361372	BRENT OSTER vs GOMEZ EDWARDS LAW GROUP LLC	The motion of defendant Gomez Edwards Law group for attorneys fees pursuant to Code of Civil Procedure, § 425.16(c)(1) is GRANTED. This Court will award attorney's fees to defendant in the amount of $35,801.00 which includes fees incurred in bringing the instant motion to recover fees.
LINE 11	20PR188312	In the Matter of David Romero	The settlement is APPROVED subject to the following: This Court will ask counsel and the Guardian to appear via the Zoom virtual platform. This Court ordinarily prefers that settlement funds be placed in a blocked account until the minor turns 18 years of age. In this particular situation, this Court would like to ask the Guardian what expenses are contemplated in raising the minor and what other sources of funds would be available. This Court will ask counsel for Petitioner to prepare the proposed Order.
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LINE #	CASE #	CASE TITLE	RULING
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Calendar Line 1

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
DEPARTMENT 20

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(For Clerk's Use Only)

CASE NO.: 20CV363266 San Jose Hardwood Floors Carpet & Vinyl v. David J. Frederickson, et al.
DATE: 15 September 2020 TIME: 9:00 am LINE NUMBER: 1

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 14 September 2020. Please specify the issue to be contested when calling the Court and Counsel.

ORDER ON DEMURRER OF DEFENDANTS NRT WEST, INC., COLDWELL BANKER RESIDENTIAL BROKERAGE COMPANY, AND JEFF BELL TO FIRST AMENDED COMPLAINT

I. Statement of Facts.

Defendant Jeff Bell ("Bell") was the acting real estate agent for defendants David J. Frederickson and Angela M. Frederickson (collectively, "Fredericksons") whose address is 3918 Paladin Drive in San Jose ("Subject Property"). (First Amended Complaint ("FAC"), ¶¶1 – 2, 4, and 23.) Defendant Bell was employed by or an agent of defendant Coldwell Banker Residential Brokerage Company ("Coldwell") and/or defendant NRT West, Inc. ("NRT"). (FAC, ¶¶5, 7, 8, and 24.) Defendant Bell was authorized to engage in communications on behalf of defendant Fredericksons regarding anticipated hardwood flooring work at the Subject Property. (FAC, ¶23.)

On or about 24 August 2017, defendant Bell contacted plaintiff San Jose Hardwood Floors Carpet & Vinyl, Inc. ("SJHF") for the purpose of seeking a bid estimate for the removal or remediation of the existing hardwood floor coverings at the Subject Property because defendant Fredericksons had just recently purchased the Subject Property and desired installation or remediation of the existing hardwood floor coverings before inhabiting the Subject Property. (FAC, ¶32.)

On or about 24 August 2017, plaintiff SJHF conducted a partial inspection of the Subject Property with defendant Bell present, in order to determine the extent of refinishing work of removal of the existing hardwood floor coverings throughout the Subject Property, as well as to determine the materials needed to install new floor coverings in the master bedroom and other areas. (FAC, ¶36.) During this inspection, defendant Bell lifted a section of carpet and padding approximately 4 square feet by 6 square feet in the living room at the Subject Property revealing existing white paint on the hardwood floor coverings directly beneath the carpet section exposed by defendant Bell. (FAC, ¶¶37 – 38.)

Plaintiff SJHF recommended all the existing carpeting and padding be removed to determine why the hardwood floor coverings were painted, the extent of white paint in other areas of the Subject Property, to examine if any preexisting damage existed before commencement of work, and to determine the type/ quantity of materials necessary for the anticipated work. (FAC, ¶¶40 – 41.)

Defendant Bell refused to allow plaintiff SJHF remove the remaining carpeting despite plaintiff SJHF's communication to defendant Bell of the high likelihood that the existing hardwood flooring was painted to conceal damage or mask pet urine odors. (FAC, ¶42.) Defendant Bell instructed plaintiff SJHF to submit a bid as soon as possible and told plaintiff Vernon Kirk ("Kirk"), president of SJHF, not to worry about any potential existing damage because there was a very short timeline for the Fredericksons to move into the Subject Property. (FAC, ¶43.)

On or about 25 August 2017, plaintiff SJHF submitted a bid to the defendant Fredericksons which included the cost of removal of the existing carpet and padding to determine the extent paint covered other areas and the reason other areas were painted. (FAC, ¶44.) Plaintiff SJHF deleted the cost ($1,048.75) of removal of the existing carpet and padding based on defendant David J. Frederickson's representation that he would perform this work himself before plaintiff SJHF commenced work. (FAC, ¶¶45 – 46.) Unknown to plaintiff SJHF, defendants Bell and Fredericksons conspired with each other to suppress information about existing material defects at the Subject Property. (FAC, ¶47.) Had plaintiff SJHF known of the material misrepresentations, plaintiff SJHF would not have entered into the contract to provide goods, materials, and services to defendant Fredericksons. (FAC, ¶48.)

On or about 25 August 2017, plaintiff SJHF and defendant Fredericksons entered into a written contract to install and refinish the existing hardwood floor coverings at the Subject Property for a price of $8,840.43 including materials and labor. (FAC, ¶¶49 – 50 and Exh. C.)

On or about 30 August 2017, defendant David J. Frederickson informed plaintiff SJHF that he had not removed the carpeting as promised. (FAC, ¶52.) On or about 1 September 2017, plaintiff SJHF had to remove the particle board and carpet in the master bedroom, incurring related costs. (FAC, ¶¶54 – 55 and 58.) Plaintiff SJHF thereafter installed new hardwood floor coverings in the master bedroom. (FAC, ¶61.) The new hardwood floor coverings were then left to acclimate from 2 September 2017 to 10 September 2017. (FAC, ¶62.)

On or about 11 September 2017, plaintiff SJHF returned to the Subject Property to accomplish sanding and refinishing of the remaining hardwood floor coverings at the Subject Property that were not to be removed, but remediated. (FAC, ¶64.) When the remaining flooring was finally fully exposed, plaintiff SJHF learned for the first time the extent of white paint and pet stains throughout the Subject Property. (FAC, ¶65.) That same day, plaintiff SJHF communicated to defendant David J. Frederickson that merely resurfacing and staining the heavily damaged floor coverings would fail. (FAC, ¶66.) Plaintiff SJHF recommended the entire flooring be removed because the pet stains and white paint were too pervasive and could not be remediated. (FAC, ¶67.) Defendant Fredericksons refused to follow plaintiff SJHF's recommendation and, instead, directed plaintiff SJHF to refinish or resurface and stain the areas that plaintiff SJHF recommended replacing. (FAC, ¶¶68 – 72.)

Plaintiff SJHF performed the work as directed, but the remediation work failed in the areas that plaintiff SJHF admonished. (FAC, ¶¶73 – 74.) Plaintiff SJHF and defendant Fredericksons then entered into an oral agreement for plaintiff SJHF to perform further remediation work in the areas that failed with defendant Fredericksons to pay for all materials ordered by plaintiff SJHF to install new hardwood floor coverings as originally recommended but defendant Fredericksons would not pay for any labor costs. (FAC, ¶¶75 – 76.) Thereafter, plaintiff SJHF completed the work in a satisfactory manner, free of defects. (FAC, ¶77.) However, defendant Fredericksons contacted plaintiff SJHF claiming defects in the workmanship performed by plaintiff SJHF. (FAC, ¶78.) Plaintiff SJHF disputed claims of defective workmanship and offered to perform an inspection, but defendant Fredericksons refused. (FAC, ¶¶79 -80.) During this time, plaintiff SJHF contacted defendant Bell to schedule an inspection to determine any defects in workmanship, but defendant Bell refused to communicate with plaintiffs. (FAC, ¶¶81 – 82.) Plaintiff SJHF subsequently learned defendant David J. Frederickson attempted to perform remediation work himself without a proper license or permit. (FAC, ¶¶80 and 83 – 84.) Defendant David J. Frederickson falsely communicated to the Contractors State License Board ("CSLB") and to various financial institutions that the work performed by plaintiff SJHF was defective warranting a chargeback of $4,000. (FAC, ¶85.)

On 7 February 2020[1], plaintiffs SJHF and Kirk filed a complaint against defendants Fredericksons, Bell, NRT, and others.

On 1 April 2020, plaintiffs SJHF and Kirk filed the operative FAC which asserts claims for:

(1) Breach of Written Contract [against defendant David J. Frederickson]
(2) Breach of Oral Contract [against defendant Fredericksons]

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[1] This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (***Government Code***, §§ 68600–68620). The California Rules of Court state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (***Ca. St. Civil Rules of Court***, Rule 3.714(b)(1)(C) and (b)(2)(C).

(3) Breach of the Implied Covenant of Good Faith and Fair Dealing [against defendant David J. Frederickson]
(4) Quantum Meruit [against defendant Fredericksons]
(5) Common Count for Account Stated [against defendant Fredericksons]
(6) Common Count for Goods and Services Rendered [against defendant Fredericksons]
(7) Implied Contractual Indemnity [against defendant David J. Frederickson]
(8) Negligence [against all defendants]
(9) Intentional Misrepresentation [against defendants Fredericksons and Bell]
(10) Negligent Misrepresentation [against defendants Fredericksons and Bell]
(11) Trade Libel [against defendant Angela Frederickson]
(12) False Promise (Theft by False Pretenses) [against defendants Fredericksons and Bell]
(13) Conversion [against defendant Fredericksons]
(14) Intentional Interference with Contractual Relations [against defendant Bell]
(15) Intentional Interference with Prospective Economic Advantage [against defendant Bell]
(16) Negligent Interference with Prospective Economic Advantage [against defendants Bell, Coldwell, NRT, et al.]
(17) Inducing Breach of Contract [against defendant Bell]
(18) Negligent Hiring, Supervision, or Retention of Employee [against defendants Coldwell, NRT, et al.]
(19) Tort Liability Asserted Against Principal (Respondeat Superior) [against defendants Coldwell, NRT, et al.]

On 2 July 2020, plaintiffs filed a request for dismissal of defendants Coldwell Banker, LLC and Coldwell Banker Real Estate, LLC.[2]

On 14 July 2020, defendants NRT, Coldwell, and Bell filed the motion now before the court, a demurrer to the eighth through tenth, twelfth, and fourteenth through nineteenth causes of action asserted in plaintiffs' FAC.

II. Defendants NRT, Coldwell, and Bell's Demurrer to Plaintiff's Complaint is SUSTAINED, in part, and OVERRULED, in part.

A. Procedural violation.

As a preliminary matter, the court notes that defendants NRT, Coldwell, and Bell's memorandum of points and authorities in support of their demurrer exceeds the page limitations set forth in California Rules of Court, rule 3.1113, subdivision (d) which states, "no opening or responding memorandum may exceed 15 pages." Defendants NRT, Coldwell, and Bell's opening memorandum of points and authorities is 19 pages. Defendants NRT, Coldwell, and Bell did not seek leave in advance from this court for a page extension as permitted by California Rules of Court, rule 3.113, subdivision (e).

"A memorandum that exceeds the page limits of these rules must be filed and considered in the same manner as a late-filed paper." (Cal. Rules of Court, rule 3.1113, subd. (g).) A court may, in its discretion, refuse to consider a late-filed paper but must indicate so in the minutes or in the order. (Cal. Rules of Court, rule 3.1300, subd. (d).) Defendants NRT, Coldwell, and Bell are hereby placed on notice that any future failure to comply with the California Rules of Court may result in the court's refusal to consider their papers.

B. Statute of limitations.

"Where the complaint discloses on its face that the statute of limitations has run on the causes of action stated in the complaint, it fails to state facts sufficient to constitute a cause of action." (*ABF Capital Corp. v. Berglass* (2005) 130 Cal.App.4th 825, 833.) However, "[t]he running of the statute must appear 'clearly and affirmatively' from the dates alleged. It is not sufficient that the complaint might be barred. If the dates establishing

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[2] The court notes that the caption of plaintiffs' FAC identifies Coldwell Banker Residential Brokerage Company and ***Coldwell Banker, LLC*** as two named defendants. In the body of the FAC, at paragraphs 5 – 6, plaintiffs' FAC again identifies Coldwell Banker Residential Brokerage Company as a defendant but then refers to ***Coldwell Banker Real Estate, LLC*** as a named defendant.

the running of the statute of limitations do not clearly appear in the complaint, there is no ground for general demurrer. The proper remedy 'is to ascertain the factual basis of the contention through discovery and, if necessary, file a motion for summary judgment.'" (*Roman v. County of Los Angeles* (2000) 85 Cal.App.4th 316, 324 – 325; internal citations omitted.)

1. Applicable statutes of limitation.

Defendants NRT, Coldwell, and Bell initially demur to the eighth, tenth and fourteenth through eighteenth causes of action on the ground that they are barred by a two year statute of limitations. With regard to the eighth and eighteenth causes of action for negligence and negligent hiring, supervision, or retention of an employee, respectively, defendants contend Code of Civil Procedure section 335.1 sets forth a two year statute of limitations for, "[a]n action for … injury to … an individual caused by the … neglect of another."

In opposition, plaintiffs contend that every cause of action in the FAC is predicated upon Bell's intentional misrepresentations and, therefore, should be governed by a three year statute of limitations. This analysis is not straightforward because of the different defendants involved and the allegations being made against them are not the same. In reviewing the FAC, the court finds the eighth and eighteenth causes of action (for negligence and negligent hiring, supervision, or retention, respectively) are not, as plaintiffs assert, predicated on defendants NRT or Coldwell's misrepresentations. Rather, the eighth and eighteenth causes of action for negligence alleges defendants Coldwell and NRT breached their "duty by failing to train or supervise … Bell … regarding how to engage in negotiations with outside vendors." (FAC, ¶¶232, 242; see also ¶¶571 – 575 and 583 – 587.) As to defendant Bell, however, the eighth cause of action for negligence alleges "Bell breached this duty [to engage in good faith and honest negotiations when seeking a bid estimate from plaintiffs for work to be completed for a client] by refusing to allow plaintiffs to survey all of the floor coverings at the premises." (FAC, ¶¶226 – 227.) This is factually distinct from, say for example, the ninth and tenth causes of action for intentional and negligent misrepresentation which are based upon defendant Bell's affirmative misrepresentations. (See FAC, ¶¶312 – 314, 363 and 366.) Plaintiffs cannot avoid their own pleading which asserts distinct causes of action for negligence and negligent hiring, supervision, and retention by now claiming that they are all predicated upon the same fraudulent conduct. (The eighteenth cause of action is not directed at defendant Bell.)

With regard to the tenth cause of action for negligent misrepresentation, defendants contend it is also subject to a two year statute of limitations. Defendants rely, in part, upon *Ventura County Nat. Bank v. Macker* (1996) 49 Cal.App.4th 1528 (*Ventura*) where the court held that a two year statute of limitations applies an action against accountants for negligent misrepresentation. The plaintiff in *Ventura* argued for a three year statute of limitations "because negligent misrepresentation is a form of fraud, and the statute of limitations for fraud is three years." (*Ventura*, *supra*, 49 Cal.App.4th at p. 1530.) The *Ventura* court explained, " '[c]ourts consider "the nature of the right sued upon, not the form of action or the relief demanded" to determine the applicable statute of limitations. [Citations.]'" (*Id.*)[3] The *Ventura* court found, however, "that the essence of this cause of action is negligence, not fraud. [Plaintiff's] allegations show a failure to meet a standard of reasonable care which results in the tortious invasion of a property right." (*Id.* at p. 1531.) "Negligent misrepresentation is born of the union of negligence and fraud. If negligence is the mother and misrepresentation the father, it more closely resembles its mother." (*Id.*)

Here, plaintiffs' tenth cause of action alleges, in relevant part, "Bell represented to Plaintiffs that the existing hardwood floor coverings at the Premises were not as heavily damaged as eventually discovered by Plaintiffs." (FAC, ¶363.) "Bell also made false representations to Plaintiffs that he would remove existing carpeting at the Premises before SJHF commenced work." (FAC, ¶366.) Here, the facts are distinguishable from *Ventura* where the plaintiff bank and defendant accountant had a direct business relationship which supported the court's implicit recognition that defendant allegedly owed plaintiff a duty to "meet a standard of reasonable care." While defendant Bell is alleged to be a real estate agent, defendant Bell is alleged to be defendant Fredericksons' agent. There is no direct business relationship between plaintiff and defendant Bell. Consequently, it is difficult for this court to reach the conclusion that the essence of this tenth cause of action is for negligence as opposed to fraud.

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[3] "The statute of limitations that applies to an action is governed by the gravamen of the complaint, not the cause of action pled." (*City of Vista v. Robert Thomas Securities, Inc.* (2000) 84 Cal.App.4th 882, 889.)

The court finds this tenth cause of action sounds in fraud and is, therefore, subject to a three year statute of limitations.

For the seventeenth cause of action of inducing breach of contract, defendants rely on *Kenworthy v. Brown* (1967) 248 Cal.App.2d 298, 301 where the court stated, "The statute of limitations applicable to the tort of inducing breach of contract is that stated in Code of Civil Procedure, section 339, subdivision 1, which is two years." Perhaps intentionally vague, the seventeenth cause of action merely incorporates earlier allegations, but does not specifically allege fraud as the factual basis for the claim instead asserting "Bell's conduct caused the Fredericksons to breach the oral agreement." (FAC, ¶567.) Since this seventeenth cause of action is not clearly premised on fraud, a two year statute of limitations applies.

As to the remaining fourteenth through sixteenth causes of action, defendants contend they are also subject to a two year statute of limitations. The statute of limitations for claims of interference with contract and interference with prospective economic advantage are also subject to a two year statute of limitations, but could be three years if the interference is based on fraud. (See *American Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451, 1481; see also *Romano v. Wilbur Ellis & Co.* (1947) 82 Cal.App.2d 670, 674.)

Like the negligence cause of action, the fourteenth and fifteenth causes of action against defendant Bell for interference with contractual relations and interference with prospective economic advantage do not appear to be premised on fraud as plaintiffs assert, but are instead based on allegations that defendant Bell "refused to allow plaintiffs to conduct complete, thorough and extensive inspections of the hardwood floor coverings at the Premises" and "engaged in actions to prevent plaintiffs from conducting thorough, complete, and extensive inspections of the Premises." (FAC, ¶¶435 and 443.) The difference between the fourteenth and fifteenth causes of action, in contrast to the eighth cause of action for negligence, is that the fourteenth and fifteenth causes of action (unlike the eighth cause of action) incorporate by reference[4] allegations from the ninth cause of action which allege, in relevant part, that Bell "had knowledge of the pet urine stains and other damage that was pervasive throughout the Premises, before plaintiffs submitted a bid estimate, ordered goods and materials and before SJHF began performing any work at the Premises." (FAC, ¶313) "Bell knew that the representations were false when he made them, or that he made the representations recklessly and without regard for their truth because Bell purposefully prevented plaintiffs from conducting a thorough and complete inspection 0f the Premises before SJHF entered into a written contract With David, in order to conceal the defects in the existing floor coverings at the Premises to induce plaintiffs to underbid the total price for the project." (FAC, ¶314.)

Given these allegations of defendant Bell's knowledge of the pet urine stains and other damage, the allegations of Bell's refusal to allow plaintiffs to inspect the Subject Property are reasonably read to allege active concealment. "Active concealment or suppression of facts by a nonfiduciary is the equivalent of a false representation, i.e., actual fraud." (*Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, 291.) There are four scenarios "in which nondisclosure or concealment may constitute actionable fraud: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) ***when the defendant actively conceals a material fact from the plaintiff***; and (4) when the defendant makes partial representations but also suppresses some material facts." (*LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 336; emphasis added.) Thus, the fourteenth and fifteenth causes of action appear to be based upon defendant Bell's active concealment or fraud, which would be subject to a three year statute of limitations.

The sixteenth cause of action for negligent interference with prospective economic advantage specifically alleges that defendant Bell made "misrepresentation of the status of the floor coverings to plaintiffs" and engaged in "actively concealing and preventing plaintiffs from ascertaining the extent of damage to the existing floor coverings at the Premises." Based on such allegations, the court finds the sixteenth cause of action sounds in fraud and is, therefore, subject to a three year statute of limitations.

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[4] FAC, ¶¶430 and 439—"Plaintiffs hereby allege and incorporate by reference, the allegations contained in all ***preceding*** paragraphs, as if fully set forth, therein." The eighth cause of action includes a similar allegation, but the allegations regarding defendant Bell's knowledge of falsity is found in a paragraph subsequent to the eighth cause of action, not in a preceding paragraph.

To summarize, the court agrees with defendants that the eighth, seventeenth, and eighteenth causes of action are subject to a two year statute of limitations.

2. Accrual.

To continue, defendants contend these causes of action would have all accrued no later than 11 September 2017 when, by plaintiffs' own allegation, plaintiffs discovered the extent of the white paint and pet stains throughout the premises and certainly no later than 14 November 2017, the date plaintiffs allege they recorded a mechanic's lien against the Subject Property after defendant Fredericksons obtained a chargeback of the $4,000 they paid to plaintiff SJHF. (See FAC, Exh. K.) According to defendants, plaintiffs had to commence this action no later than 14 November 2019, but since plaintiffs did not commence this action until 7 February 2020, defendants contend these four causes of action are barred.

> "With respect to torts, generally speaking, a claim accrues and the statute of limitations begins to run upon the occurrence of the last event essential to the cause of action, even if the plaintiff is unaware that a cause of action exists. The infliction of actual and appreciable harm will commence the limitations period. However, the discovery rule postpones commencement of the limitation period until the plaintiff discovers or should have discovered the facts essential to his cause of action. Under this rule, possession of 'presumptive' as well as 'actual' knowledge will commence the running of the statute. A plaintiff is charged with 'presumptive' knowledge so as to commence the running of the statute once he or she has notice or information of circumstances to put a reasonable person on inquiry, or has the opportunity to obtain knowledge from sources open to his investigation."

(*Shamsian v. Atlantic Richfield Co.* (2003) 107 Cal.App.4th 967, 979 – 980; internal citations and punctuation omitted.)

> "Under the discovery rule, the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her. The limitations period begins once the plaintiff has notice or information of circumstances to put a reasonable person on inquiry. A plaintiff need not be aware of the specific 'facts' necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her."

(*Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625, 642 – 643.)

> A plaintiff has reason to discover a cause of action when he or she "has reason at least to suspect a factual basis for its elements." [Citations.] Under the discovery rule, suspicion of one or more of the elements of a cause of action, coupled with knowledge of any remaining elements, will generally trigger the statute of limitations period. [Citations.] Norgart explained that by discussing the discovery rule in terms of a plaintiff's suspicion of "elements" of a cause of action, it was referring to the "generic" elements of wrongdoing, causation, and harm. [Citation.] In so using the term "elements," we do not take a hypertechnical approach to the application of the discovery rule. Rather than examining whether the plaintiffs suspect facts supporting each specific legal element of a particular cause of action, we look to whether the plaintiffs have reason to at least suspect that a type of wrongdoing has injured them.

(*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 807 (*Fox*).)

The court will begin by examining the eighth cause of action for negligence directed against defendant Bell. In relevant part, plaintiffs allege defendant Bell's refusal to allow plaintiffs to survey all of the floor coverings at the Subject Property "caused plaintiffs to submit a bid estimate that was underbid for the amount of work and services that would have been necessary to remove the entire hardwood flooring at the Premises and install new hardwood floor coverings." (FAC, ¶228.) The court would agree with defendants' assertion that plaintiffs were aware of the existence of a cause of action for neglect having suffered the loss of payment and having taken legal

action to seek recovery of that loss by recording a mechanic's lien. The FAC discloses plaintiffs recorded a mechanic's lien on 14 November 2017. (FAC, Exh. K.)

Similarly, with regard to defendants Coldwell and NRT, the eighth cause of action alleges their failure to properly train and/or supervise Bell "caused plaintiffs damages when Bell refused to allow plaintiffs to perform a thorough and unimpeded investigation of the Premises prior to SJHF submitting a bid estimate." (FAC, ¶¶233 and 243.) In pursuing a mechanic's lien, plaintiffs had reason to suspect that their loss was caused by some wrongdoing so as to start the running of the statute of limitations.

Plaintiff's arguments regarding the relation back doctrine in opposition are confusing do not have any application here. More appropriately, plaintiffs raise the issue of delayed discovery. However, "In order to rely on the discovery rule for delayed accrual of a cause of action, '[a] plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence.' [Citation.] In assessing the sufficiency of the allegations of delayed discovery, the court places the burden on the plaintiff to 'show diligence'; 'conclusory allegations will not withstand demurrer.'" (*Fox*, *supra*, 35 Cal.4th at p. 808.) Plaintiffs apparently argue that they did not discover or were not fully aware of defendant Bell's, NRT's, or Coldwell's involvement with defendant Fredericksons until resolution of the CSLB matter. The court finds this argument somewhat disingenuous in view of allegations that defendant Bell made affirmative misrepresentations to and/or concealed information from plaintiffs on or about 24 August 2017 regarding the condition of the floor coverings at the Subject Property which plaintiffs realized were not true and/or discovered the truth by 11 September 2017 when the floor coverings were exposed. Thus, by plaintiffs' own allegations, defendants' misconduct (refusing to allow full inspection, affirmative misrepresentations, concealment, etc.) was apparent no later than 11 September 2017 and the FAC discloses plaintiffs suffered resulting harm no later than 14 November 2017. To plead delayed discovery, plaintiffs would have to plead around these facts, but have not done so in the FAC nor does the court consider any of the extrinsic facts proffered by plaintiffs in opposition.

The same analysis applies to plaintiffs' and seventeenth causes of action. Accordingly, defendants NRT, Coldwell, and Bell's demurrer to the eighth, seventeenth, and eighteenth causes of action in plaintiffs' FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)], i.e., are barred by the applicable statutes of limitation, is SUSTAINED with 10 days' leave to amend.

C. Justifiable Reliance/ Proximate Cause.

Defendant Bell[5] demurs to the ninth, tenth, and twelfth causes of action for intentional misrepresentation, negligent misrepresentation, and false promise, respectively, on the ground that these are all fraud based causes of action and the FAC does not allege plaintiffs justifiable reliance on any of defendant Bell's statements or nondisclosures. The general elements of a fraud claim are: (1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (or "scienter"); (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage. (*Lazar v. Super. Ct.* (1996) 12 Cal.4th 631, 638 (*Lazar*).

"'Except in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a plaintiff's reliance is reasonable is a question of fact.'" (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239.) In *Guido v. Koopman* (1991) 1 Cal.App.4th 837, 843 (*Guido*), the court stated that, "Justifiable reliance is an essential element of a claim for fraudulent misrepresentation, and the reasonableness of the reliance is ordinarily a question of fact. However, whether a party's reliance was justified may be decided as a matter of law if reasonable minds can come to only one conclusion based on the facts." The court also wrote that, "In determining whether one can reasonably or justifiably rely on an alleged misrepresentation, the knowledge, education and experience of the person claiming reliance must be considered." (*Guido*, *supra*, 1 Cal.App.4th at p. 843.) "Except in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a plaintiff's reliance is reasonable is a question of fact. [Citation.] 'What would constitute fraud in a given instance might not be fraudulent when exercised toward another person. The test of the representation is its actual effect on the particular mind …'" (*Blankenheim v. E.F. Hutton & Co.* (1990) 217 Cal.App.3d 1463, 1475.)

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[5] The ninth, tenth, and twelfth causes of action are not directed against defendants Coldwell and NRT.

Defendant Bell invites the court to decide this question as a matter of law in light of other allegations made in the FAC. In particular, defendant Bell directs the court's attention to exhibit H to the FAC which is alleged to be a "dispute notification form [from Merchant Services] to plaintiffs to dispute the alleged chargeback proceedings by defendants [Fredericksons]." (FAC, ¶103.) In that exhibit, it states, in relevant part, "SJHF principal has 31 years of experience and has encountered this problem numerous times in the past." Plaintiffs also allege they inspected the Subject Property with defendant Bell who revealed a small portion of the hardwood flooring and plaintiff observed white paint. (FAC, ¶¶37 – 38.) Plaintiff SJHF recommended all the existing carpeting and padding be removed to determine why the hardwood floor coverings were painted, the extent of white paint in other areas of the Subject Property, and to examine if any preexisting damage existed before commencement of work. (FAC, ¶¶40 – 41.) Defendant Bell refused to allow plaintiff SJHF remove the remaining carpeting despite plaintiff SJHF's communication to defendant Bell of the high likelihood that the existing hardwood flooring was painted to conceal damage or mask pet urine odors. (FAC, ¶42.) In light of these allegations, defendant Bell contends plaintiffs' reliance is not justifiable as a matter of law.

In *Orient Handel v. United States Fidelity and Guaranty Co.* (1987) 192 Cal.App.3d 685, 694 (*Handel*), the court adopted the following quote from Witkin: "If the plaintiff having access to the necessary information actually makes an independent investigation which the defendant does not hinder, he will be charged with knowledge of the facts which reasonable diligence would have disclosed, and he cannot claim reliance upon the representations." "A defrauded person, however, is not barred from maintaining an action merely because he commenced an investigation if it was incomplete or abandoned before discovery of the falsity, particularly if the defendant has a superior knowledge of the facts, or if it is difficult for the plaintiff to ascertain all the facts or he is not competent to judge the facts without expert assistance." (*Handel*, *supra*, 192 Cal.App.3d at p. 694.)

Here, the court declines defendant Bell's invitation to decide the issue of justifiable reliance as a matter of law. The court is of the opinion that the determination is better left to a trier of fact who can consider all the facts and weigh those facts accordingly.

Defendant Bell argues further with regard to the ninth, tenth, and twelfth fraud-based causes of action that plaintiff has not sufficiently alleged proximate causation. "To recover damages for fraud, a plaintiff must have sustained damages proximately caused by the misrepresentation. A damage award for fraud will be reversed where the injury is not related to the misrepresentation." (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1252.) "[N]o liability attaches if the damages sustained were otherwise inevitable or due to unrelated causes. If the defrauded plaintiff would have suffered the alleged damage even in the absence of the fraudulent inducement, causation cannot be alleged and a fraud cause of action cannot be sustained." (*Orcilla v. Big Sur, Inc.* (2016) 244 Cal.App.4th 982, 1008; punctuation and citations omitted.)

Defendant Bell contends that the damages plaintiffs suffered (loss of money from the contract with the Fredericksons, ensuing litigation, and reputation loss) are the result of defendant Fredericksons' dissatisfaction with plaintiffs' work rather than any misrepresentations purportedly made by defendant Bell. This conflicts with plaintiffs' allegation in the FAC that, "As a direct and proximate result of Bell's conduct, as alleged, supra, plaintiffs suffered damages." (FAC, ¶¶329, 377, 409, and 416.) Again, defendant Bell is inviting this court to decide the issue of proximate causation as a matter of law. "[T]he issue of proximate cause ordinarily presents a question of fact. However, it becomes a question of law when the facts of the case permit only one reasonable conclusion." (*Capolungo v. Bondi* (1986) 179 Cal.App.3d 346, 354.) Again, the court declines defendant Bell's invitation to decide the issue of proximate causation as a matter of law. As with justifiable reliance, the court is of the opinion that the determination of proximate causation is better left to a trier of fact.

Accordingly, defendant Bell's demurrer to the ninth, tenth, and twelfth causes of action in plaintiffs' FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] is OVERRULED.

D. Interference.

Defendants Coldwell, NRT, and Bell demur to the fourteenth through seventeenth causes of action on several grounds. For instance, defendant Bell demurs to the fourteenth cause of action for intentional interference with contractual relations. "The elements which a plaintiff must plead to state the cause of action for intentional interference with contractual relations are (1) a valid contract between plaintiff and a third party; (2) defendant's

knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126.)

Defendant Bell argues this fourteenth cause of action fails because plaintiffs allege Bell engaged in misconduct on 24 August 2017, ***before*** plaintiff SJHF and defendant David Frederickson entered into a contract on 25 August 2017. (See FAC, ¶¶32 – 50 and 435 – 436.) Defendant Bell relies upon *PMC, Inc. v. Saban Entertainment, Inc.* (1996) 45 Cal.App.4th 579, 601 (PMC) (disapproved on other grounds by *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1159, fn. 11.) where the court wrote, "we are compelled to conclude that a cause of action for intentional interference with contract requires an underlying enforceable contract."

As to this argument to the fourteenth cause of action and all other arguments raised with regard to the fifteenth through seventeenth causes of action, plaintiffs merely cite the relevant CACI civil jury instructions and assert that all the necessary elements have been pleaded in the FAC. Plaintiffs fail to substantively address the specific points and arguments raised by defendants.

Accordingly, defendants NRT, Coldwell, and Bell's demurrer to the fourteenth through seventeenth causes of action in plaintiffs' FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] is SUSTAINED with 10 days' leave to amend.

E. Negligent Supervision.

Defendants Coldwell and NRT demur to the eighteenth cause of action for negligent supervision by citing Civil Code 2338 which states:

> PRINCIPAL'S RESPONSIBILITY FOR AGENT'S NEGLIGENCE OR OMISSION. Unless required by or under the authority of law to employ that particular agent, ***a principal is responsible to third persons for the negligence of his agent*** in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and for his willful omission to fulfill the obligations of the principal.

(Emphasis added.)

Civil Code section 2338 essentially codifies the doctrine of respondeat superior. Defendants Coldwell and NRT focus on the highlighted language above to argue that there must be some actionable conduct on the part of the underlying employee or agent in order for there to be liability assessed against the principal, defendants Coldwell and NRT. Defendants Coldwell and NRT essentially incorporate all of their arguments to the other causes of action to argue that since plaintiffs have not sufficiently stated any causes of action against defendant Bell, then defendants Coldwell and NRT are not liable as Bell's principals/ employers.

However, the eighteenth cause of action is for direct liability against defendants Coldwell and NRT, not vicarious liability. "California case law recognizes the theory that an employer can be liable to a third person for negligently hiring, supervising, or retaining an unfit employee. [Citation.] Liability is based upon the facts that the employer knew or should have known that hiring the employee created a particular risk or hazard and that particular harm materializes. [Citation.]" (*Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1054.) " 'An employer may be liable to a third person for the employer's negligence in hiring or retaining an employee who is incompetent or unfit. [Citation.]' [Citation.] 'Liability for negligent hiring … is based upon the reasoning that if an enterprise hires individuals with characteristics which might pose a danger to customers or other employees, the enterprise should bear the loss caused by the wrongdoing of its incompetent or unfit employees.' [Citation.] Negligence liability will be imposed on an employer if it 'knew or should have known that hiring the employee created a particular risk or hazard and that particular harm materializes.' [Citation.]" (*Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133, 1139; see also *Federico v. Superior Court* (1997) 59 Cal.App.4th 1207.)

Accordingly, defendants NRT and Coldwell's demurrer to the eighteenth cause of action in plaintiffs' FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] is OVERRULED.

F. Respondeat Superior

Defendants Coldwell and NRT demur to the nineteenth cause of action entitled, "Tort Liability Asserted Against Principal (Respondeat Superior)" by arguing that it is derivative of those causes of action directed at defendant Bell and if those other causes of action against defendant Bell fail, so too does this nineteenth cause of action. "The employer's liability is wholly derived from the liability of the employee. The employer cannot be held vicariously liable unless the employee is found responsible.' (*Lathrop v. HealthCare Partners Medical Group* (2004) 114 Cal.App.4th 1412, 1423 citing *Shaw v. Hughes Aircraft Co.* (2000) 83 Cal.App.4th 1336, 1347—"A judgment on the merits in favor of an employee bars recovery against the employer when the only claim against it is based on vicarious liability and there is no allegation the employer committed an independent tort.")

In light of the court's rulings above, defendants have not entirely prevailed on their demurrer to causes of action directed against defendant Bell. Consequently, defendants NRT and Coldwell's demurrer to the nineteenth cause of action in plaintiffs' FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] is OVERRULED.

III. Order.

Defendants NRT, Coldwell, and Bell's demurrer to the eighth, seventeenth, and eighteenth causes of action in plaintiffs' FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)], i.e., are barred by the applicable statutes of limitation, is SUSTAINED with 10 days' leave to amend.

Defendant Bell's demurrer to the ninth, tenth, and twelfth causes of action in plaintiffs' FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] is OVERRULED.

Defendants NRT, Coldwell, and Bell's demurrer to the fourteenth through seventeenth causes of action in plaintiffs' FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] is SUSTAINED with 10 days' leave to amend.

Defendants NRT and Coldwell's demurrer to the eighteenth cause of action in plaintiffs' FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] is OVERRULED.

Defendants NRT and Coldwell's demurrer to the nineteenth cause of action in plaintiffs' FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] is OVERRULED.

Defendants are given 10 days' leave to answer where the demurrers were overruled.

_____ _____

DATED:

HON. SOCRATES PETER MANOUKIAN
Judge of the Superior Court
County of Santa Clara

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Calendar Line 2

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
DEPARTMENT 20

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(For Clerk's Use Only)

CASE NO.: 20CV366086 **Milpitas Town Center 2008 L.P. v. Hin & Anderson Inc., et al.**
DATE: 15 September 2020 **TIME: 9:00 am** **LINE NUMBER: 2**

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 14 September 2020. Please specify the issue to be contested when calling the Court and Counsel.

ORDER ON DEFENDANTS HIN & ANDERSON INC. DBA MAX MUSCLE'S; JAMES ANDERSON'S; AND VIMOL HIN'S DEMURRER TO PLAINTIFF'S COMPLAINT

I. Statement of Facts.

Plaintiff Milpitas Town Center 2008 L.P. ("Plaintiff") is the owner of real property commonly known as the "Milpitas Town Center" shopping center located at 477-765 East Calaveras Blvd. and 132-148 N. Milpitas Blvd. in Milpitas ("Property"). (Complaint, ¶1.)

On or about 9 September 2016, Plaintiff and defendant Hin & Anderson Inc. dba Max Muscle ("Tenant") entered into a written agreement ("Lease") whereby Plaintiff leased a portion of the Property located at 647 E. Calaveras Blvd. ("Leased Premises") to Tenant for a term of 10 years commencing on or about 1 January 2017. (Complaint, ¶8.) To induce Plaintiff to enter into the Lease with Tenant, defendants James Anderson ("Anderson") and Vimol Hin ("Hin") executed a written agreement to guarantee all of Tenant's obligations, covenants, and agreements under the Lease ("Lease Guaranty"). (Complaint, ¶9.)

Pursuant to the terms of the Lease, Tenant agreed, among other things, to pay Plaintiff fixed monthly rent in the sum of $3,850 with yearly increases. (Complaint, ¶10.) In addition, Tenant agreed to pay as "additional rent" certain expenses associated with common area maintenance, taxes, late charges, advertising, and insurance. (*Id.*)

On or about 29 March 2019, Tenant abandoned the Leased Premises and no rent has been paid for the Leased Premises to Plaintiff by Tenant. (Complaint, ¶11.)

On 16 April 2020[6], Plaintiff filed a complaint against defendants Tenant, Anderson, and Hin asserting causes of action for:

(1) Breach of Lease [against Tenant]
(2) Breach of Lease Guaranty [against Anderson and Hin]

On 14 July 2020, defendants Tenant, Anderson, and Hin filed the motion now before the court, a demurrer to Plaintiff's complaint.

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[6] This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (***Government Code***, §§ 68600–68620). The California Rules of Court state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (***Ca. St. Civil Rules of Court***, Rule 3.714(b)(1)(C) and (b)(2)(C).

II. Defendants' Demurrer to Plaintiff's Complaint is OVERRULED.

As a preliminary matter, Plaintiff asserts in opposition that defendant Tenant is a suspended corporation and, therefore, lacks the ability to engage in any litigation. (See Rev. & Tax. Code, §23301; *Grell v. Laci Le Beau Corp.* (1999) 73 Cal.App.4th 1300, 1306—"During the period that a corporation is suspended for failure to pay taxes, it may not prosecute or defend an action.") Plaintiff requests, among other things, that the court strike defendant Tenant's demurrer. However, such relief is more appropriately sought by a separately noticed motion.

"To prevail on a cause of action for breach of contract, the plaintiff must prove (1) the contract, (2) the plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting damage to the plaintiff." (*Richman v. Hartley* (2014) 224 Cal.App.4th 1182, 1186; see also CACI, No. 303.)

Without citation to any authority, defendants argue initially that the complaint is deficient because Plaintiff failed to attach a copy of the agreements at issue. If the contract is written, "the terms must be set out verbatim in the body of the complaint or a copy of the written instrument must be attached and incorporated by reference." (*Otworth v. Southern Pacific Transportation Co.* (1985) 166 Cal.App.3d 452, 459.) Alternatively, "[i]n an action based on a written contract, a plaintiff may plead the legal effect of the contract rather than its precise language." (*Construction Protective Services, Inc. v. TIG Specialty Ins. Co.* (2002) 29 Cal.4th 189, 199.) "This is more difficult, for it requires a careful analysis of the instrument, comprehensiveness in statement, and avoidance of legal conclusions, and it involves the danger of variance where the instrument proved differs from that alleged; it is not frequently employed. Nevertheless, it is an established method." (4 Witkin, California Procedure (4th ed. 1997) Pleading, §480, p. 573.) Plaintiff has properly employed this alternative approach. The failure to attach a copy of the Lease or Lease Guaranty does not render this complaint deficient.

Defendants argue next that the complaint is uncertain because Plaintiff has not clearly alleged a breach. "A demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures." (*Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 616.) Paragraph 11 of the complaint states, in relevant part, "On March 29, 2019, Tenant abandoned the Leased Premises and no rent has been paid for the Leased Premises to Plaintiff by Tenant." Defendants Anderson and Hin agreed to guarantee all of Tenant's obligations, covenants, and agreements under the Lease. (Complaint, ¶9.) Taken together, these allegations, incorporated by reference into the first and second causes of action, adequately explain when and how defendants breached the Lease and Lease Guaranty. Defendants also attempt to introduce a number of extrinsic facts to support their argument. "A demurrer tests only the legal sufficiency of the pleading." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213 – 214.) The court does not consider extrinsic facts.

As a further basis for demurrer, defendants apparently contends Plaintiff has not adequately alleged performance. "The plaintiff cannot enforce the defendant's obligation unless the plaintiff has performed the conditions precedent imposed on him. [Citation.] Accordingly, the allegation of performance is an essential part of his cause of action. [Citation.]" (4 Witkin, California Procedure (4th ed. 1997) Pleading, §491, pp. 581 – 582.) "But the foregoing requirement is reduced to a mere formality by [Code Civ. Proc., §457[7]] which makes it unnecessary to set forth the facts of such performance: The plaintiff may allege, in general terms, that he has 'duly performed all the conditions on his part.'" (*Id.* at p. 582.) Plaintiff has done so here in the complaint at paragraphs 14 and 18.

Finally, defendants take issue with Plaintiff's failure to allege a date of breach thereby preventing defendants from ascertaining whether the statute of limitations applies. As noted above, the complaint explicitly alleges Tenant's abandonment of the Leased Premises on or about 29 March 2019 and no rent being paid. "Where the complaint discloses on its face that the statute of limitations has run on the causes of action stated in the

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[7] Code Civ. Proc., §457 states, "In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part, and if such allegation be controverted, the party pleading must establish, on the trial, the facts showing such performance."

complaint, it fails to state facts sufficient to constitute a cause of action." (*ABF Capital Corp. v. Berglass* (2005) 130 Cal.App.4th 825, 833.) However, "[t]he running of the statute must appear 'clearly and affirmatively' from the dates alleged. It is not sufficient that the complaint might be barred. If the dates establishing the running of the statute of limitations do not clearly appear in the complaint, there is no ground for general demurrer. The proper remedy 'is to ascertain the factual basis of the contention through discovery and, if necessary, file a motion for summary judgment.'" (*Roman v. County of Los Angeles* (2000) 85 Cal.App.4th 316, 324 – 325; internal citations omitted.) Here, the running of the statute of limitations does not appear clearly and affirmatively from the date alleged in the complaint.

Accordingly, defendants Tenant, Anderson, and Hin's demurrer to Plaintiff's complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] and on the ground that the pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is OVERRULED.

III. Order.

Defendants Tenant, Anderson, and Hin's demurrer to Plaintiff's complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] and on the ground that the pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is OVERRULED. Defendants are given 10 days' leave within which to answer the complaint.

_____ _____

DATED: **HON. SOCRATES PETER MANOUKIAN**
Judge of the Superior Court
County of Santa Clara

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Calendar Line 3

SUPERIOR COURT, STATE OF CALIFORNIA
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(For Clerk's Use Only)

CASE NO.: 18CV323048 **Jesus Garnica et al vs Santa Clara Unified School District**
DATE: 15 September 2020 **TIME: 9:00 am** **LINE NUMBER: 3**

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 14 September 2020. Please specify the issue to be contested when calling the Court and Counsel.

ORDER ON MOTION OF PLAINTIFF TO QUASH SUBPOENA FOR MEDICAL RECORDS.

I. Statement of Facts.

Plaintiff filed this complaint on 7 February 2018.[8] Jury trial is currently set for 7 December 2020.[9]

On 3 December 2016, Plaintiff Jesús Garnica was alleged to have suffered a traumatic brain injury when a defective, unsecured cafeteria table dislodged from its wall mount at the defendant District's school and knocked him unconscious. He was approximately five years of age at the time. He was unconscious for about five minutes.

As a result of this event, plaintiffs now claim that "[m]inor plaintiff now has permanent neurocognitive deficits with altered neurodevelopmental trajectory."[10]

Defendant Santa Clara Police Athletic League (PAL) believes that it has discovered that Catalina Juárez, the mother of young Jesús, was a victim of domestic violence sometime in 2014. Such evidence includes Juárez entering the Santa Clara Valley Medical Center ("SCVMC") emergency department in March 2014 complaining of head injury caused by Mr. Garnica striking her, related 911 calls to police regarding the incident, and the subsequent arrest and charging 0f Mr. Garnica With criminal (i) battery of a spouse, (ii) injury to a spouse and (iii) felony false imprisonment. Santa Clara Superior Court records online reveal a criminal complaint for Family Violence and the same charges stated above against Mr. Garnica in Santa Clara Superior Court, Case N0. C1486403.

To that end, PAL has subpoenaed medical records from Santa Clara Valley Medical Center from 1 January 2013 to the present. Jesús was approximately two years of age at the time.

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[8] This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (***Government Code***, §§ 68600–68620). The California Rules of Court state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (***Ca. St. Civil Rules of Court***, Rule 3.714(b)(1)(C) and (b)(2)(C).

[9] Plaintiff's motion for preference was granted and continued on this date by Judge Lie. The issue of firm dates for civil jury trials in this County is a moving target.

[10] Motion of plaintiffs for preferential trial setting, page 2, lines 2-10.

Plaintiffs contend that there is no evidence that Jesus suffered any injuries arising out of this purported 2014 domestic violence incident. There is further no evidence that plaintiff Juárez's medical records in any way referred to such injuries.

Plaintiff seeks an order quashing the subpoena. This motion is made pursuant to ***Code of Civil Procedure***, §§ 1985.3 and 1987.1, based upon the fact that the requested medical records are:

(1) protected by plaintiff Juárez's constitutional right to privacy;

(2) unlikely to lead to the discovery of evidence relevant to this lawsuit;

(3) would unruly prejudice plaintiff Juárez in a manner that outweighs any potential benefit resulting from their disclosure; and

(4) the subject subpoena is incurably over broad as to time and scope.[11]

According to plaintiffs, the defense medical examiners find no evidence of any trauma to the minor as a result of the 2014 report of a domestic violence incident. Apparently the child does not have any current neurologic deficits, either.

Plaintiffs also seek monetary sanctions for compensation for expenses incurred in the costs of preparing this motion.

PAL did not file its opposition to this motion until 8 September 2020. As noted by the reply papers of the plaintiffs, the opposition was filed and served on 8 September 2020 or eight days late.

An opposition brief to a discovery motion Section 1005(b) of the Code of Civil Procedure provides that all opposing papers must be filed at least nine with the court and must be served on each party at least 10 days before the hearing. (***Code of Civil Procedure***, § 1005, subd. (b).) A Court has the discretion to refuse whether to consider a late filed paper. (***Kapitanski v. Von's Grocery Co.*** (1983) 146 Cal.App.3d 29, 32-33.) However, the Court may also exercise its discretion to consider late-filed opposition papers. (See ***Hobson v. Raychem Corp.*** (1999) 73 Cal.App.4th 614, 625; ***Rules of Court***, rule 3.1300(d).)

The Declaration of Brian Johnson, filed along with the opposition papers, asserts that "Ms. Juárez claimed emotional distress makes her medical records subject to discovery in the course of this action. The records sought are also relevant to Jesús Garnica's exposure to domestic violence issues in his home that present alternate causation scenarios for his alleged cognitive injuries."[12]

The Declaration also purports to attach a copy of the declaration of June Yu Paltzer. Ph.D., ABPP-CN, but it is only the last page of the declaration. The same declaration is attached to the Declaration of Mark Sigala filed along with the moving papers. This Doctor's conclusions are that

> A minor concussion Jesús sustained in 2016 is without lasting effects on a young and healthy child's thinking and problem-solving abilities. Post-accident treatment (of lack thereof) is inconsistent with a more serious injury. To reiterate educational records document overall low-average to average academic performance. Neuropsychological assessment results show an intelligent, psychological well-adjusted and delightful child. Additionally, the currently observed optimism and self-efficacy are again consistent with Jesus's history and affords a positive prognosis."

Given that a similar issue is going to be in front of this Court on 1 October 2020 with the defense motion to compel Ms. Juárez to provide further deposition testimony, the Court will consider the papers even though untimely.

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[11] This Court observes that defendants have calendared a motion on 1 October 2020 to compel plaintiff Juárez to answer further deposition questions.

[12] Page 3, lines 7-9.

II. Analysis.

Code of Civil Procedure, §§ 1985, 1985.3, 2020.010, and 2020.020(b) allow a party to issue a judicially authorized subpoena for the production of business records involving a consumer, including medical records by way of a subpoena duces tecum.

As with all discovery, the requested information must be *relevant* to the proceeding. (***Code of Civil Procedure***, § 2017.010.)

"Unless otherwise limited by order of the court in accordance with this title, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence. Discovery may relate to the claim or defense of the party seeking discovery or of any other party to the action. Discovery may be obtained of the identity and location of persons having knowledge of any discoverable matter, as well as of the existence, description, nature, custody, condition, and location of any document, tangible thing, or land or other property." (***Code of Civil Procedure***, § 2017.010.)

Discovery is allowed for any matters that are relevant to the subject matter of the action, not privileged, and reasonably calculated to lead to the discovery of admissible evidence. (See ***Code of Civil Procedure***, § 2017.010; ***Calcor Space Facility, Inc. v. Superior Court*** (1997) 53 Cal.App.4th 216, 223.) Information is "relevant to the subject matter" if it might reasonably assist a party in evaluating the case, preparing for trial, or facilitating settlement thereof. (See ***Gonzalez v. Superior Court*** (1995) 33 Cal.App.4th 1539, 1546.) These relevance standards are applied liberally with any doubt generally resolved in favor of discovery. (See ***Colonial Life & Acc. Ins. Co. v. Superior Court*** (1982) 31 Cal.3d 785, 790.)

"In the context of discovery, evidence is 'relevant' if it might reasonably assist a party in evaluating its case, preparing for trial, or facilitating a settlement. (See e.g., ***Gonzalez v. Superior Court*** (1995) 33 Cal.App.4th 1539.) Admissibility is not the test, and it is sufficient if the information sought might reasonably lead to other admissible evidence." (***TBG Ins. Services Corp. v. Superior Court*** (2002) 96 Cal.App.4th 443, 448.)

"Relevancy to the subject matter of the litigation is a much broader concept than relevancy to the precise issues presented by the pleadings. The subject matter of the action is the circumstances and facts out of which the cause of action arises; it is the property, contract, or other thing involved in the dispute; it is not the act or acts which constitute the cause of action, but describes physical facts in relation to which the suit is prosecuted. Information is "relevant to the subject matter if its discovery will tend to promote settlement or assist the party in preparing for trial." (***Norton v. Superior Court*** (1994) 24 Cal.App.4th 1750, 1760.)

"[I]n order to be discoverable, the information sought must meet a two-pronged test. It must be (1) relevant to the subject matter involved in the pending action and (2) either admissible in evidence or reasonably calculated to lead to the discovery of admissible evidence." (***Norton v. Superior Court*** (1994) 24 Cal. App. 4th 1750, 1755.)

"Ultimately, it is for the court that oversees the trial in this matter to determine whether evidence pertaining to footprinting or any other area of inquiry is relevant and admissible. In resolving a discovery dispute, the court is in no position to make that determination. It can only attempt to foresee whether it is possible that information in a particular subject area could be relevant or admissible at the time of trial." (***Maldonado v. Superior Court*** (2002) 94 Cal.App.4th 1390, 1397.)

It is this Court's responsibility to adequately protect the privacy rights of the Plaintiff while, at the same time, not to deprive the Defendants of an opportunity to contest Plaintiff's claims of damages. As noted in ***Gonzalez v. Superior Court*** (1995) 33 Cal.App.4th 1539, 1542:

> "For discovery purposes, information is relevant if it "might reasonably assist a party in evaluating the case, preparing for trial, or facilitating settlement . . . ." (citation omitted.) Admissibility is not the test and information, unless privileged, is discoverable if it might reasonably lead to admissible evidence. (citation omitted.) These rules are applied liberally in favor of discovery (citation omitted) and (contrary to popular belief), fishing expeditions are

permissible in some cases. (citation omitted.) Although fishing may be improper or abused in some cases, that is not of itself an indictment of the fishing expedition per se. More specifically, the identity of witnesses must be disclosed if the witness has 'knowledge of any discoverable matter,' including fact, opinion and any information regarding the credibility of a witness (including bias and other grounds for impeachment). (citations omitted.) (***Gonzalez v. Superior Court***, 33 Cal. App. 4th at 1546.)

"[T]he claim that a party is engaged upon a fishing expedition is not, and under no circumstances can be, a valid objection to an otherwise proper attempt to utilize the provisions of the discovery statutes. Should the so-called fishing expedition be subject to other objections, it can be controlled." (***Greyhound Corp. v. Superior Court of Merced County*** (1961) 56 Cal.2d 355, 386). "[T]he court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression. In granting or refusing such order the court may impose upon either party or upon the witness the requirement to pay such costs and expenses, including attorney's fees, as the court may deem reasonable." (***Greyhound Corp. v. Superior Court of Merced County***, supra at 370-371.)

This Court is really unclear on what is the current status of Jesús' neurologic/neuropsychological state.

This Court is also sensitive to the rights of privacy of Ms. Juárez and of Jesús. What this Court does not want to do is to issue orders impacting those rights without having the benefit of full information.

Given that this issue is going to present itself again within the next two weeks, this Court will CONTINUE the hearing on this motion to 1 October 2020 at 9:00 AM to be heard in conjunction with the motion to compel Ms. Juárez to further answers to deposition questions. Additionally, this Court will request the following:

1. That the records in question be delivered to this Department for in camera inspection;

2. Counsel may provide this Court with additional medical reports pertaining to the neurologic/neuropsychological status of young Jesus.

III. Conclusion and Order.

This Court will CONTINUE the hearing on this motion to 1 October 2020 at 9:00 AM to be heard in conjunction with the motion to compel Ms. Juárez to further answers to deposition questions.

_____ _____

DATED: **HON. SOCRATES PETER MANOUKIAN**
Judge of the Superior Court
County of Santa Clara

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Calendar Line 7

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
DEPARTMENT 20

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(For Clerk's Use Only)

CASE NO.: 19CV353314 **Rosalinda Ramos CERANO et al vs Michael Taylor et al**
DATE: 15 September 2020 **TIME: 9:00 am** **LINE NUMBER: 7**

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 14 September 2020. Please specify the issue to be contested when calling the Court and Counsel.

ORDER ON MOTION OF DEFENDANTS/CROSS-COMPLAINANTS TO COMPEL PLAINTIFF'S TO SERVE RESPONSES TO WRITTEN DISCOVERY, PRODUCE DOCUMENTS AND FOR MONETARY SANCTIONS.

I. Statement of Facts.

Plaintiffs filed this complaint on 15 August 2019.[13]

This lawsuit arises out of a motor vehicle accident occurring on 23 August 2017. Plaintiff, Rosalinda Ramos-Cerano, an unlicensed driver, was operating a 2006 Toyota with her three children, her sister, and her sister's son as occupants. She stopped abruptly causing Michael Taylor, a Granite Rock employee driving a GMC Sierra pickup truck to rear end the Toyota. Mr. Navarette, driving a 2014 Lexus, rear-ended Mr. Taylor, pushing him again into the Toyota.

On 6 February 2020, moving parties Granite Rock and Michael Taylor served form interrogatories and request for production of documents upon each of the plaintiffs. Moving parties also served specially tailored interrogatories upon Rosalinda Ramos-Cerano only.

Plaintiffs were required to serve responses by 12 March 2020. On 17 March 2020 and on 23 April 2020, counsel for moving parties sent a follow-up letter to counsel for plaintiffs requesting responses. On 20 May 2020, counsel for moving parties sent email correspondence to counsel for plaintiff indicating that it was in the process of preparing a motion to compel responses based on the failure of plaintiffs to produce responses to the discovery requests.

These requests went unrequited.

Counsel for Granite Rock and Michael Taylor filed this motion on 10 July 2020. No opposition has been filed.

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[13] This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (***Government Code***, §§ 68600–68620). The California Rules of Court state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (***Ca. St. Civil Rules of Court***, Rule 3.714(b)(1)(C) and (b)(2)(C).

II. Analysis.

A. Interrogatories.

The rules and procedures governing interrogatories is set forth in ***Code of Civil Procedure***, § 2030.010 et seq. Interrogatories may be served without leave of court any time during the action, with a few exceptions which include: (1) during the first 10 days after service of summons or defendant's appearance in the action (whichever is first); and (2) cutoff on discovery before trial (***Code of Civil Procedure*** § 2030.20).

Unless excused by protective order, the party to whom the interrogatories are directed is under a duty to respond to each question separately, under oath, and within the 30 day time limits. (***Code of Civil Procedure***, § 2030.210(a); 2030.260(a).) The court may shorten or extend time for response by motion from one of the parties Id. Similarly, the parties may stipulate to an extension of time for responding, which must be in writing. (***Code of Civil Procedure***, § 2030.270).

Failing to respond within the time limit described above waives most objections to the interrogatories, which includes claims of privilege and work product. (***Code of Civil Procedure***, § 2030.290(a); (see ***Leach v. Superior Court (Markum)*** (1980) 111 Cal.App.3d 902, 905-906).

The request of moving parties to compel all plaintiffs to respond to the form interrogatories interrogatories is GRANTED. The request of moving parties to compel plaintiff Rosalinda Ramos-Cerano to respond to special interrogatories is GRANTED. All plaintiffs are to provide code-compliant responses without objections within 30 days of the filing and service of this Order.

B. Request for Production of Documents.

The rules and procedures governing requests for production (also referred to as inspection demands) are governed by CCP § 2031.010 et. seq. A demand may be served on any other party to the action (***Code of Civil Procedure***, § 2031.010). A demand may be used to obtain inspection, copying, testing or sampling of: (1) documents, (2) tangible things, (3) land, and (4) electronically stored information in the possession, custody or control of another party. *Id*. These demands are limited to matters within the permissible scope of discovery. *Id*. A demand may be served at any time during the lawsuit with a few exceptions including: (1) the first 10 days after service of summons or defendant's appearance in the action (whichever is first); and (2) cutoff on discovery before trial (***Code of Civil Procedure***, § 2031.20). The party seeking discovery serves a demand for inspection on the party believed to be in possession, custody or control of the documents or property to be inspected (***Code of Civil Procedure***, § 2031.040).

The party to whom a demand is served must respond within 30 days after service, unless excused by protective order. (***Code of Civil Procedure***, § 2031.260). The court has the power to extend or shorten the time allowed for response. *Id*. Additionally, the parties may agree to extend the time allowed to respond, but it must be confirmed in writing. (CCP § 2031.270).

Failure to timely respond to a demand results in a waiver of all objections to the requests, including claims of privilege or work product protection (***Code of Civil Procedure***, § 2031.300(a)). The court has the authority to grant relief from such waiver if (1) the party belatedly served a response that is in substantial compliance; and (2) the party filed a noticed motion supported by declaration showing that the delay resulted from mistake, inadvertence or excusable neglect. (***Code of Civil Procedure***, § 2031.300(a)).

A motion to compel may be made if: (1) there is no response at all; (2) the responses have been made but they are not satisfactory to the demanding party; or (3) where an agreement to comply has been, but compliance is not forthcoming. (***Code of Civil Procedure***, § 2031.300-2031.320).

The request of moving parties to compel all plaintiffs to respond to the requests for production of documents is GRANTED. All plaintiffs are to provide code-compliant responses without objections within 30 days of the filing and service of this Order.

C. Sanctions.

Granite Rock also seeks sanctions against plaintiffs and their counsel for failure to provide timely responses and forcing this motion to be filed to obtain said responses.

Counsel for moving parties declares that he spent 4.50 hours preparing the notice of motion, memorandum of points and authorities, this declaration and the proposed order. He anticipates that an hour will be spent preparing and attending a hearing if such is requested. His billable rate is $195.00 per hour. He is be requesting this Court award Granite Rock $1,072.50 in the way of sanctions.[14]

"A request for a sanction shall, in the notice of motion, identify every person, party, and attorney against whom the sanction is sought, and specify the type of sanction sought. The notice of motion shall be supported by a memorandum of points and authorities, and accompanied by a declaration setting forth facts supporting the amount of any monetary sanction sought." (***Code of Civil Procedure***, § 2023.040.)

Moving parties' caption in the notice of motion identifies monetary sanctions as the type of sanction being sought.. An argument might be made that the body of the notice is defective as it did not state the type of sanction sought.

However, this Court believes that plaintiffs were given fair notice that counsel for moving parties would be seeking monetary sanctions. The amount claimed is not unreasonable. The request of defendants/cross-complainant's Michael Taylor and Granite Rock Company for monetary sanctions is GRANTED. Plaintiff shall pay counsel for moving parties the sum of $1,072.50 within 30 days of the filing and service of this Order.

III. Conclusion and Order.

The request of moving parties to compel all plaintiffs to respond to the form interrogatories interrogatories is GRANTED. The request of moving parties to compel plaintiff Rosalinda Ramos-Cerano to respond to special interrogatories is GRANTED. All plaintiffs are to provide code-compliant responses without objections within 30 days of the filing and service of this Order.

The request of moving parties to compel all plaintiffs to respond to the requests for production of documents is GRANTED. All plaintiffs are to provide code-compliant responses without objections within 30 days of the filing and service of this Order.

The request of defendants/cross-complainant's Michael Taylor and Granite Rock Company for monetary sanctions is GRANTED. Plaintiff shall pay counsel for moving parties the sum of $1072.50 within 30 days of the filing and service of this Order.

DATED:

HON. SOCRATES PETER MANOUKIAN
Judge of the Superior Court
County of Santa Clara

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[14] No request was made for a filing fee for the motion.

Calendar Line 8

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COUNTY OF SANTA CLARA
DEPARTMENT 20

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(For Clerk's Use Only)

CASE NO.: 18CV336490 **Safe Products for Californians, LLC vs Homegoods, Inc. et al**
DATE: 15 September 2020 **TIME: 9:00 am** **LINE NUMBER: 8**

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 14 September 2020. Please specify the issue to be contested when calling the Court and Counsel.

ORDER ON MOTION OF PLAINTIFF TO APPROVE PROPOSITION 65 SETTLEMENT AND CONSENT JUDGMENT.

The motion of Plaintiff Safe Products for Californians LLC for an order approving proposition 65 settlement and consent judgment and attorneys fees is GRANTED.

Counsel for Plaintiff is to prepare the final order and judgment for signature by this Department.

_____ _____

DATED: **HON. SOCRATES PETER MANOUKIAN**
Judge of the Superior Court
County of Santa Clara

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Calendar Line 9

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
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(For Clerk's Use Only)

CASE NO.: 19CV340508 **City of Santa Clara vs D.E. II Restaurants, Inc.**
DATE: 15 September 2020 **TIME: 9:00 am** **LINE NUMBER: 9**

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 14 September 2020. Please specify the issue to be contested when calling the Court and Counsel.

ORDER CONTINUING MOTION OF PLAINTIFF FOR ASSIGNMENT TO JUDGE FOR PURPOSES OF TRIAL.

I. Statement of Facts.

Plaintiff City of Santa Clara (the "City") filed an eminent domain action against Defendant D.E. II Restaurants, Inc. ("D.E. II Restaurants") on January 2, 2019. On April 10, 2019, D.E. II Restaurants filed a Cross-Complaint for Inverse Condemnation against the City.

The Cross-Complaint demands precondemnation damages from the alleged deflation of the value of the business after the City sought to acquire D.E. II Restaurant's lease to a City-owned building. The City wanted to acquire D.E. II Restaurant's lease in order to make infrastructure improvements to the property for a mixed-use development known as City Place. On December 11, 2018, the City's City Council adopted a resolution declaring that the public interest and necessity required acquisition of the property.

On 14 July 2020, this Court heard the motion of plaintiff City of Santa Clara to bifurcate the trial of the cross-complaint. In an order filed on 8 August 2020, this Court denied the motion without prejudice and deferred the ultimate decision to the trial judge.

In this current motion, the City of Santa Clara seeks assignment to a judge now.

II. Analysis.

Defendant opposes the motion, suggesting that the current motion is an attempt to re-argue the exact same motion that it lost on 14 July 2020.

As noted by this Court after the hearing of 14 July 2020, consolidating the inverse condemnation action and the eminent domain action could be more appropriate and efficient. It is "now settled that liability for unlawful precondemnation activities may be considered a part of a single eminent domain proceeding." (***People ex rel. Dept. Pub. Wks. v. Southern Pacific Trans. Co.*** (1973) 33 Cal.App.3d 960, 965; 135 Cal.App.3d at 79.) Therefore, rather than bifurcation, the claim for inverse condemnation can instead be considered part of the original eminent domain proceeding.

The Court is going to CONTINUE this motion and the related Trial Setting Conference to 15 December 2020 at 9:00 AM in this Department. By that time this Court will have a better picture as to what the trial calendar will look like when civil trials resume.

III. Conclusion and Order.

The Court is going to CONTINUE this motion and the related Trial Setting Conference to 15 December 2020 at 9:00 AM in this Department.

_____ _____

DATED: **HON. SOCRATES PETER MANOUKIAN**
Judge of the Superior Court
County of Santa Clara

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Calendar Line 10

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
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CASE NO.: 20CV361372 **Brent Oster vs Gomez Edwards Law Group LLC**
DATE: 15 September 2020 **TIME: 9:00 am** **LINE NUMBER: 10**

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 14 September 2020. Please specify the issue to be contested when calling the Court and Counsel.

ORDER ON MOTION OF DEFENDANT GOMEZ EDWARDS LAW GROUP FOR ATTORNEYS FEES. (Civil Procedure, § 425.16)

I. Statement of Facts.

Plaintiff filed this complaint on 7 January 2020.[15] Defendant Gomez Edwards Law Group is a law firm engaged in the practice of Family Law in San Jose. The Complaint alleges that the law firm committed perjury to the court, tried to push forward litigation left by prior counsel [apparently the Moreno Law Firm], and Coached Kathia Oster to file false police reports alleging a violation of a domestic violence restraining order issued against plaintiff. The complaint state causes of action for:

1. aiding and abetting false reports to the police;
2. aiding and abetting fraud;
3. perjury and fraud;
4. concealing evidence; and
5. retaliation, dissuading a witness, intimidation, threats.

Defendants answered the complaint. Defendant later filed on 6 March 2020 an anti-SLAPP motion pursuant to ***Code of Civil Procedure***, § 425.16. On 11 August 2020, Judge Lie granted the motion and struck the complaint in its entirety. She further ordered that the matter be dismissed.

On 14 August 2020, defendant filed its memorandum of costs and motion for attorneys fees. While Plaintiff filed opposition to the motion strike the complaint, he has not filed opposition to this current motion for attorneys fees.

II. Analysis.

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[15] This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (***Government Code***, §§ 68600–68620). The California Rules of Court state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (***Ca. St. Civil Rules of Court***, Rule 3.714(b)(1)(C) and (b)(2)(C).

". . . . . [A] prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. . . . ." (***Code of Civil Procedure***, § 425.16(c)(1).) Defendant now seeks attorneys fees and costs in the amount of $35,801.00 which includes fees incurred in bringing the instant motion to recover fees.

As to the specific cost items disputed by any party seeking attorneys fees, it is this Court's obligation to review the supporting documents and the basis for challenges by the party opposing the award of fees.. "T]rial courts have a duty to determine whether a cost is reasonable in need and amount. However, absent an explicit statement by the trial court to the contrary, it is presumed the court properly exercised its legal duty. (***Ross v. Superior Court*** (1977) 19 Cal.3d 899, 913; ***Thon v. Thompson*** (1994) 29 Cal.App.4th 1546, 1548-1549.)[16]

A verified fee bill is prima facie evidence the costs, expenses, and services listed were necessarily incurred. (***Hadley v. Krepel*** (1985) 167 Cal.App.3d 677, 682.) A declaration attesting to the accuracy of the fee bill is entitled to a presumption of credibility. (***Horsford v. Board of Trustees of California State University*** (2005) 132 Cal.App.4th 359, 396.)

But a presumption is just that, a presumption. "In the rebuttal of a presumption it is not necessary to produce preponderant evidence to overcome it. A presumption is overcome if sufficient evidence is introduced to balance the presumption." (***Odden v. County Foresters, Firewardens and County Fire Protection District Firemen's Retirement Board of Los Angeles County*** (1951) 108 Cal.App.2d 48, 50.)

A fee request that appears unreasonably inflated is a special circumstance permitting the trial court to reduce the award or deny one altogether. (See ***Serrano v. Unruh*** (1982) 32 Cal.3d 621, 635; ***Guillory v. Hill*** (2019) 36 Cal.App.5th 802, 806; ***Chavez v. City of Los Angeles*** (2010) 47 Cal.4th 970, 989-991.[17]) In such an evaluation, this Court may consider "factors such as the complexity of the case and procedural demands, the skill exhibited and the results achieved." (***Goglin v. BMW of North America, LLC*** (2016) 4 Cal.App.5th 462, 470.)

"However, while meager fee awards to successful counsel may discourage able counsel from engaging in many forms of public interest litigation that should be encouraged, the unquestioning award of generous fees may encourage duplicative and superfluous litigation and other conduct deserving no such favor. (See ***Thayer v. Wells Fargo Bank*** (2001) 92 Cal.App.4th 819, 839.) Counsel should not be encouraged to over-litigate claims for the purpose of driving up the settlement, believing their tactics will be rewarded with a fee award. (***Garcia v. Mercedes-Benz United States*** (2018) 21 Cal.App.5th 1259 ["A rule that creates a perverse set of incentives is untenable."].)

The Court should also look at the litigation history and consider the amount of work undertaken prior to the resolution of the lawsuit. On the one hand, a party "cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in response." (***Serrano v. Priest*** (1982) 32 Cal.3d 621, 638; ***City of Riverside v. Rivera***, 477 U.S. 561, 580 fn.11 (1986).) "Obviously, the more stubborn the opposition the more time would be required . . ." (***Wolf v. Frank*** (5th Cir.1977) 555 F.2d 1213, 1217.) "Those who elect a militant defense ... [are responsible for] the time and effort they exact from their opponents." (***Perkins v. New Orleans***

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[16] Compare with ***Acosta v. SI Corporation*** (2005) 129 Cal. App. 4th 1370, 1380: "Here, we have a specific statement to the contrary. At oral argument, the trial court referred to the motion to tax and stated "What I don't want to do, … is go through this individually. I have done that too many times, and it's just as tedious as can be. I will do it if I have to, but I don't want to." The matter was taken under submission. The trial court later denied the motion to tax costs in its entirety and did not specifically address the costs challenged by plaintiffs. Under these circumstances, we cannot say that the court fulfilled its obligation to determine whether SI was entitled to the disputed cost items. We remand for that determination."

[17] In ***Chavez***, the California Supreme Court unanimously affirmed that, "[a] fee request that appears unreasonably inflated is a special circumstance permitting the trial court to reduce the award or deny one altogether." (Id., (2010) 47 Cal.4th 970, 989-91 [affirming denial of fees].) That holding broke no new ground--***Chavez*** relied upon ***Serrano v. Unruh*** (1982) 32 Cal. 3d 621, 635 & n.21 (citing federal cases holding that, under the "unreasonably inflated" rule, fees can be denied where, among other circumstances, (1) the "initial claim is 'exorbitant' and time unreasonable;" (2) the fee claim is "overreaching;" or (3) the request was "unreasonable" and the documentation "inadequate"), and ***Ketchum v. Moses*** (2001) 24 Cal. 4th 1122, 1137. ***Chave***z was the first time the high Court applied that rule to entirely deny fees. The California Supreme Court held the trial court correctly awarded zero to the prevailing party because plaintiff had succeeded only on a "single claim," and that "the amount of time an attorney might reasonably expect to spend in litigating such a claim" was low, given "the amount of damages awarded." (***Chavez v. City of Los Angeles***, 47 Cal. 4th at 990-91.)

Athletic Club (E.D.La.1976) 429 F.Supp. 661, 667; see ***Weeks v. Baker McKenzie*** (1998) 63 Cal.App.4th 1128, 1175-1176.)

California courts determine fee enhancements under the rule stated in ***Ketchum v. Moses*** (2001) 24 Cal.4th 1122. Under the "lodestar" approach, this Court will look at the lodestar as the basic fee for comparable legal services in the community. It may be adjusted by the court based on factors including, as relevant herein, (1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, (4) the contingent nature of the fee award. (***Serrano v. Priest*** (1977) 20 Cal.3d 25 [also known as "***Serrano III***"]; ***Ketchum v. Moses*** (2001) 24 Cal. 4th 1122, 1132.)

The reasonable market value of the attorney's services is the measure of a reasonable hourly rate. This standard applies regardless of whether the attorneys claiming fees charge nothing for their services, charge at below-market or discounted rates, represent the client on a straight contingency fee basis, or are in-house counsel. (See ***Nemecek & Cole v. Horn*** (2012) 208 Cal.App.4th 641, 651.) "There is no requirement that the reasonable market rate mirror the actual rate billed." (***Syers Properties III, Inc. v. Rankin*** (2014) 226 Cal.App.4th 691, 701.)

In ***Nemecek & Cole***, the Court of Appeal approved the use of the "Laffey Matrix" a "general schedule and pay table for attorneys put out by the Department of Justice," in determining a "reasonable" hourly rate for insurance defense counsel. (See ***Nemecek & Cole***, supra, 208 Cal.App.4th at 650-651; see also ***Syers Properties III***, supra, 226 Cal.App.4th at 702 (reasonable hourly rate determined by reference to Laffey Matrix and to declarations of counsel).)

This Court has reviewed the invoices for services charged and does not believe that they are unreasonable.

III. Conclusion and Order.

The motion of defendant Gomez Edwards Law group for attorneys fees pursuant to ***Code of Civil Procedure***, § 425.16(c)(1) is GRANTED. This Court will award attorney's fees to defendant in the amount of $35,801.00 which includes fees incurred in bringing the instant motion to recover fees.

_____ _____

DATED:

HON. SOCRATES PETER MANOUKIAN
Judge of the Superior Court
County of Santa Clara

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SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
DEPARTMENT 20

161 North First Street, San Jose, CA 95113
408.882.2320 · 408.882.2296 (fax)
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(For Clerk's Use Only)

CASE NO.: 20PR188312 **In the Matter of David Romero**
DATE: 15 September 2020 **TIME: 9:00 am** **LINE NUMBER: 11**

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 14 September 2020. Please specify the issue to be contested when calling the Court and Counsel.

ORDER ON PETITION FOR MINORS COMPROMISE.

I. Statement of Facts.

Petitioner filed this petition on 30 June 2020.[18] She is the mother of the minor. The minor is 12 years of age.

The minor's father, David Romero, Jr., was walking on US 101 southbound in San Jose California. He was struck by the defendant. The father died.

II. Analysis.

The gross settlement in this matter is $20,000. There were no other claimants and no other defendants.

Counsel for the minor, the law firm of Child & Jackson of Folsom, California, seek an attorney's fee of $4,876.25. That sum is a reasonable fee and is approved.

Net settlement to the minor is in the amount of $14,628.75. Petitioner requests that the court not order the funds deposited into a blocked account, but rather request that the funds be released to the petitioner so that petitioner can utilize the funds to raise the minor. The settlement funds will be deposited into insured accounts in one or more financial institutions in this state, subject to withdrawal of only upon the authorization of this Court.

The petition filed on behalf of the minor appears to comply with ***Rules of Court***, rule 7.950[19] in that it is a verified petition and appears to contain a full disclosure of all information that has any bearing upon the reasonableness of the compromise.

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[18] This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (***Government Code***, §§ 68600–68620). The California Rules of Court state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (***Ca. St. Civil Rules of Court***, Rule 3.714(b)(1)(C) and (b)(2)(C).

[19] "A petition for court approval of a compromise of or a covenant not to sue or enforce judgment on a minor's disputed claim; a compromise or settlement of a pending action or proceeding to which a minor or person with a disability is a party; or disposition of the proceeds of a judgment for a minor or person with a disability under chapter 4 of part 8 of division 4 of the ***Probate Code*** (commencing with section 3600) or ***Code of Civil Procedure*** section 372 must be verified by the petitioner and

III. Conclusion and Order.

The settlement is APPROVED subject to the following:

This Court will ask counsel and the Guardian to appear via the Zoom virtual platform.

This Court ordinarily prefers that settlement funds be placed in a blocked account until the minor turns 18 years of age. In this particular situation, this Court would like to ask the Guardian what expenses are contemplated in raising the minor and what other sources of funds would be available.

This Court will ask counsel for Petitioner to prepare the proposed Order.

_____ _____

DATED: **HON. SOCRATES PETER MANOUKIAN**
Judge of the Superior Court
County of Santa Clara

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must contain a full disclosure of all information that has any bearing upon the reasonableness of the compromise, covenant, settlement, or disposition. Except as provided in rule 7.950.5, the petition must be prepared on a fully completed Petition to Approve Compromise of Disputed Claim or Pending Action or Disposition of Proceeds of Judgment for Minor or Person With a Disability (form MC-350)." (***Rules of Court***, rule 7.950.)

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